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Lim Tee Keong v HLG Securities Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
B-03(IM)-2-01 OF 2014
ABDUL AZIZ ABDUL RAHIM, MOHAMAD ARIFF AND MAH WENG
KWAI JJCA
3 MARCH 2016

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*Bankruptcy — Discharge — Application for — Discretion of court in granting
discharge — Whether investigations were carried out by Director General of
Insolvency — Whether bankrupt filed statement of affairs within stipulated time
— Whether non-compliance breach of statutory provision — Whether bankrupt
should be discharged — Bankruptcy Act 1967*

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This was an appeal by a bankrupt ('the appellant') who was the applicant in the High Court against the dismissal of his application to be discharged from his bankruptcy which was made pursuant to s 33 of the Bankruptcy Act 1967 ('the Act'). The appellant had passed away and for the purpose of continuing the appeal, the court allowed the applicant Lim Chee Wah to carry on the appeal in place of the bankrupt. Before the application for discharge was made, the bankrupt had been in bankruptcy for about ten years. He was about 65 years at that time and was diagnosed with Stage IV Oesophageal Carcinoma in 2014. The bankrupt filed an application ('encl 12a') to adduce further evidence of his medical condition but before the encl 12a could be heard, the bankrupt succumbed to his illness and passed away. The appellant contended that the judge 'was not alive to the judicial approach' in dealing with the application under s 33 of the Act and had failed to address his mind to two critical facts, namely that the bankrupt was adjudged a bankrupt due to losses suffered on the share market; and the bankrupt had suffered the losses during the Asian Financial Crisis 1997/1998. Therefore, the bankrupt had become 'insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle'. The appellant also submitted that the judge had erred to hold that the bankrupt had committed an offence under s 16(2)(b) of the Act when he failed to file his statement of affairs within 21 days. The creditor submitted that the discharge should not be allowed because the Director General of Insolvency's ('DGI') report was incomplete and had failed to show that the DGI had undertaken a comprehensive and thorough investigation on the assets of the bankrupt.

Held, dismissing the appeal with costs of RM5,000:

- (1) The discretion to be exercised by the court under s 33(3) of the Act is wide and it is 'fettered only with the consideration of equity, fairness and good conscience' and that a bankrupt should not be put under bondage for his entirety. In exercising the discretion to discharge a bankrupt from a bankruptcy, the court must take into consideration the report of the DGI as to the bankrupt's conduct and affairs (see para 13). A
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- (2) The DGI should have undertaken a more thorough investigation into the assets of the bankrupt, especially assets which the bankrupt owned in his name, within five years before the date of the receiving order ('RO') was pronounced. This would enable the DGI to make a more realistic assessment of the bankrupt's financial situation. The DGI report should have gone further by highlighting all the properties which had been previously owned by the bankrupt and the current owners of the property now (if any). The report should highlight whether the current owners were in a close relationship with the bankrupt and whether there are evidences showing that the current owners were holding the properties as nominees for the bankrupt. The DGI had failed to address all the issues in the report (see para 16). C
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- (3) The trial judge had ordered that the bankrupt come up with 55% dividend because the bankrupt had committed an offence under the Act for failing to file his statement of affairs within 21 days after the RO was ordered as required under s 16(3). The requirement under the section is mandatory and therefore non-compliance would mean breach of statutory provision. The trial judge was thus correct to equate it with an offence. A contempt of court is a punishable offence (see para 23). E
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[Bahasa Malaysia summary]

Ini adalah rayuan oleh seorang bankrap ('perayu') yang mana adalah pemohon di Mahkamah Tinggi terhadap penolakan permohonannya untuk dibebaskan daripada kebankrapannya yang dibuat berikutan s 33 Akta Kebankrapan 1967 ('Akta'). Perayu telah meninggal dunia dan bagi tujuan untuk meneruskan rayuan, mahkamah membenarkan pemohon Lim Chee Wah untuk meneruskan rayuan menggantikan si bankrap. Sebelum permohonan untuk pembebasan dibuat, si bankrap telah berada dalam kebankrapan lebih kurang selama sepuluh tahun. Dia berumur lebih kurang 65 tahun pada masa itu dan didianogsis dengan penyakit Oesophagal Carcinoma Peringkat IV pada tahun 2014. Si bankrap telah memfailkan permohonan ('lampiran 12a') untuk mengemukakan keterangan lanjut mengenai keadaan kesihatannya tetapi sebelum lampiran 12a boleh didengar, si bankrap meninggal dunia akibat sakit. Perayu berhujah bahawa hakim 'was not alive to the judicial approach' dalam berurusan dengan permohonan di bawah s 33 Akta dan gagal untuk memberi tumpuan kepada dua fakta kritikal, iaitu bahawa si bankrap dijatuhkan hukuman bankrap akibat kerugian yang dialami dalam pasaran saham; dan si bankrap telah mengalami kerugian semasa Krisis Kewangan Asia G
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- A 1997/1998. Oleh itu, si bankrap telah menjadi 'insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle'. Perayu juga berhujah bahawa hakim telah tersilap untuk memutuskan bahawa si bankrap telah melakukan kesalahan di bawah s 16(2)(b) Akta apabila dia gagal untuk memfailkan penyataan hal ehwal dalam masa 21 hari. Pemiutang berhujah bahawa pembebasan tidak patut dibenarkan kerana laporan Ketua Pengarah Insolvensi ('KPI') tidak lengkap dan telah gagal untuk menunjukkan bahawa KPI telah melakukan siasatan yang menyeluruh dan teliti ke atas aset-aset si bankrap.
- B
- C **Diputuskan**, menolak rayuan dengan kos sebanyak RM5,000:
- (1) Budi bicara yang dilaksanakan oleh mahkamah di bawah s 33(3) Akta adalah luas dan ia adalah 'fettered only with the consideration of equity, fairness and good conscience' dan orang yang bankrap tidak patut diletakkan di bawah pengabdian bagi keseluruhannya. Dalam melaksanakan budi bicara untuk membebaskan seseorang yang bankrap daripada kebangkrutan, mahkamah mesti mempertimbangkan laporan KPI mengenai tingkah laku dan hal ehwal kebangkrutan (lihat perenggan 13).
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- E
- (2) KPI patut menjalankan siasatan yang lebih teliti ke atas aset si bankrap, terutamanya aset yang mana si bankrap miliki dalam namanya, dalam masa lima tahun sebelum tarikh perintah penerimaan ('RO') diisytiharkan. Ini akan membolehkan KPI membuat penilaian yang lebih realistik terhadap keadaan kewangan si bankrap. Laporan KPI patut dilanjutkan dengan menyerlahkan kesemua hartanah yang dimiliki sebelumnya oleh si bankrap dan pemilik sekarang hartanah tersebut (jika ada). Laporan patut menyerlahkan sama ada pemilik sekarang mempunyai hubungan rapat dengan si bankrap dan sama ada terdapat keterangan menunjukkan bahawa pemilik sekarang memegang hartanah tersebut sebagai penama untuk si bankrap. KPI gagal untuk memberi perhatian kepada kesemua isu dalam laporan (lihat perenggan 16).
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- (3) Hakim perbicaraan telah memerintahkan bahawa si bankrap untuk bersedia dengan dividen 55% kerana si bankrap telah melakukan kesalahan di bawah Akta kerana gagal untuk memfailkan penyataan hal ehwal dalam masa 21 hari selepas RO diperintahkan seperti dikehendaki di bawah s 16(3). Kehendak di bawah seksyen adalah mandatori dan oleh itu ketidakpatuhan akan bermaksud pelanggaran peruntukan statutori.
- H
- I Hakim perbicaraan oleh itu adalah betul untuk semakannya dengan kesalahan. Penghinaan mahkamah adalah kesalahan yang boleh dihukum (lihat perenggan 23).]

Notes

For cases on application for discharge, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3311–3313.

Cases referred to

Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors) [2011] 2 MLJ 218, CA (refd)

Joshua Tan Pin Pin; ex p William Jacks & Co (M) Sdn Bhd, Re [2007] 4 MLJ 534; [2007] 3 CLJ 153, HC (refd)

Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd, Re [2001] 6 MLJ 311; [2001] 3 CLJ 960, HC (folld)

Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd, Re [2004] 5 MLJ 227; [2004] 1 CLJ 624, HC (refd)

Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation, Re [1998] 1 SLR 903, HC (refd)

Siow Ah Moi @ Seow Yin Fong; ex p United Orient Leasing Co Bhd, Re [2007] 3 MLJ 713, HC (refd)

Zainuldin bin Ahmad Ex p Wong Siay Patt & Anor, Re [2007] MLJU 365, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 16(2)(b), (3), 33, 33(3), (4), (6), 117A, Part VII
Penal Code ss 421, 422, 423, 424

Appeal from: Bankruptcy No 29–3142 of 1999 (High Court, Shah Alam)

S Ravindran (Sreenevasan Young) for the appellant.

Mandave Singh (Raja Darryl & Loh) for Tan Seng Long; the respondent.

Ravindra Kumar (Raja Darryl & Loh) for HLG Securities Sdn Bhd; the respondent.

Trevor Jason Mark Padasian (Raja Darryl & Loh) for Orix Credit Sdn Bhd; the respondent.

V Vinodh (Raja Darryl & Loh) for Pan Malaysia Equities Sdn Bhd and Kim Ong Eng Securities; the respondent.

Ong Chee Kwan (Chew Pei Ying with him) (Raja Darryl & Loh) for TA Securities and TA Centre Bhd; the respondent.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] This is an appeal by the appellant (a bankrupt) who was the applicant in the High Court against the dismissal of his application to be discharged from his bankruptcy on 21 November 2013 by the High Court on appeal to the judge in chambers. The application for the discharge was made pursuant to s 33

A of the Bankruptcy Act 1967 ('the Act'). Earlier the deputy registrar had heard the application and had dismissed the same on 5 July 2013.

B [2] The bankrupt in this case, Lim Tee Keong, had passed away on 14 April 2014 before this appeal could be heard and disposed of. For the purpose of continuing this appeal, this court had on 30 April 2014, on an application of one Lim Chee Wah the younger brother of the bankrupt, allowed the applicant Lim Chee Wah to carry on this appeal in place of the bankrupt.

C [3] Before the application for discharge was made on 11 March 2013 the bankrupt has been in bankruptcy for about ten years. He was about 65 years at that time and was diagnosed with Stage IV Oesophageal Carcinoma (cancer of the throat) sometime in February 2014. The bankrupt had filed an application on 17 March 2014 ('encl 12a') to adduce further evidence of his medical condition. But before the application ('encl 12a') could be heard, the bankrupt D succumbed to his illness and passed away. In his affidavit in support of the application affirmed on 14 March 2014 (before his death), the late bankrupt had stated that it was his fervent wish to have 'his name cleared and to spend the remainder of his life free from the shackles and stigma of the bankruptcy that E has plague him since 2003.

[4] The late bankrupt was adjudged as a bankrupt on 18 February 2003 on a petition presented by the respondent.

F [5] Since the application for discharge as a bankrupt was made under s 33 of the Act, it would be helpful if we re-produce the section in full:

Discharge of bankrupt by order of court

G 33(1) A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

(2) (Deleted by Act A827).

H (3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

I (4) In all cases where it is proved to the satisfaction of the court that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under section 421, 422, 423 or 424 of the Penal Code [Act 574] the court shall unless Bankruptcy 37 for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than

fifty per centum has been paid to the creditors, and on proof of any of the facts mentioned in subsection (6) the court shall either – **A**

- (a) refuse the order; or
- (b) suspend the operation of the order for a specified time; or
- (c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or **B**
- (d) grant an order of discharge subject to such conditions as aforesaid.

The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently. **C**

(5) If at any time after the expiration of two years from the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of such order, the court may modify the terms of the order or any subsequent order in such manner and upon such conditions as it thinks fit. **D**

(6) The facts hereinbefore referred to are –

- (a) that the bankrupt has omitted to keep such books of account as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy, or within such shorter period immediately preceding that event as the court deems reasonable in the circumstances; **E**
- (b) that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent; **F**
- (c) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation, proof whereof shall lie on him, of being able to pay it;
- (d) that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities; **G**
- (e) that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations or extravagance in living, or by recklessness, or gambling or want of reasonable care and attention to his business and affairs; **H**
- (f) that the bankrupt has delayed or put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or other legal proceedings properly brought or instituted against him;
- (g) that the bankrupt has brought on or contributed to his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action; **I**
- (h) that the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors;

- A** (i) that the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view to making his assets equal to an amount of fifty ringgit per centum of the amount of his unsecured liabilities;
- B** (j) that the bankrupt has in Malaysia or elsewhere on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors;
- (k) that the bankrupt has been guilty of any fraud or fraudulent breach of trust;
- C** (l) that the bankrupt has within three months immediately preceding the date of the receiving order sent goods out of Malaysia under circumstances which afford reasonable grounds for believing that the transaction was not a bona fide commercial transaction; and
- D** (m) that the bankrupt's assets are not of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty ringgit per centum of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot justly be held blameable.
- E** (7) For the purposes of this section a bankrupt's assets shall be deemed of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realized or is likely to realise or with due care in realization might have realized an amount equal to fifty ringgit per centum of the amount of his unsecured liabilities and a report by the Director General of Insolvency shall be prima facie evidence of the amount of such liabilities.
- F** (8) For the purposes of this section the report of the Director General of Insolvency shall be prima facie evidence of the statements therein contained.
- (9) Notice of the appointment by the court of the day for hearing the application for discharge shall be published as prescribed and sent fourteen days at least before the day so appointed to each creditor who has proved, and the court shall hear the
- G** Director General of Insolvency, and may also hear any creditor. At the hearing the court may put such questions to the debtor and receive such evidence as it thinks fit.
- (10) The court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the Director General of Insolvency for any balance, or part of the balance, of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts.
- H**
- I** (11) (Deleted by Act A1035).
- (12) For the purposes of this section the following presumptions shall be made –
- (a) if at any time after the expiration of six months from the date of the adjudication the Director General of Insolvency reports to the court that the value of the assets which have been realised, together with the

estimated value of the assets which are realisable, is insufficient to pay a dividend of fifty ringgit per centum on the debts proved in the bankruptcy, it shall be presumed, until the contrary is proved, that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent;

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- (b) in determining whether a bankrupt was, or knew, or had reason to believe himself to be insolvent at any particular date, every debt owing to him by any person resident out of the jurisdiction, which debt had been at such date due for more than twelve months, shall be excluded from the computation of the value of the assets, and for the purpose of such computation shall be deemed not to be an asset;

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- (c) a bankrupt shall be deemed to have continued to trade after knowing or having reason to believe himself to be insolvent if, having continued to trade after he was in fact insolvent, he –

(i) is unable to satisfy the court that he had reasonable ground for believing himself to be solvent; or

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(ii) fails without reasonable excuse, proof whereof shall lie on him, to produce a proper balance sheet for each of the three years immediately preceding the bankruptcy, every such balance sheet being made within a reasonable time after the expiration of the year to which it relates, and showing the true state of his affairs at the end of such year;

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- (d) any preference given by the bankrupt to any creditor within the three months immediately preceding the date of the receiving order shall, until the contrary is proved, be deemed to be undue.

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[6] It will be noticed that the decision to discharge a bankrupt from a bankruptcy is an exercise of discretion by a judge. In can be made at any time after a bankrupt had been adjudged a bankrupt. In exercising the discretion, the court which hears the application for discharge must take into consideration a report of the DGI as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. More importantly is the provision of s 33(4) of the Act where it provides that in all cases where it is proved to the satisfaction of the court that the bankrupt has committed an offence under the Act or under any written law repealed by the Act or under s 421, 422, 423 or 424 of the Penal Code the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than 50% has been paid to the creditors.

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[7] In *Lim Hun Swee v Malaysia British Assurance Bhd* (currently known as *Allianz General Insurance Malaysia Bhd*) & Ors (*judgment creditors*) [2011] 2 MLJ 218, Ramly Ali JCA (as he then was, and now a Federal Court judge) speaking of for this court held, at p 226, that consideration of the DGI report

A by the court hearing an application for discharge from bankruptcy is a mandatory requirement and the most important consideration. However the court is not bound to accept the report if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. The learned judge further said that:

B Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge. The purpose of the DGI report is to secure a full and complete investigation and disclosure of all material facts or informations relating to the bankruptcy particularly on issues stipulated under s 33(4) and (6) of the Act. The report is not only for the interest of the bankrupt and the creditors but also the interest of the public as well as the business community at large.

[8] In this appeal, learned counsel for the appellant besides harping on the fact that the late bankrupt was of advanced old age and suffering from cancer of the throat and had endured the bankruptcy for ten years, contends that the learned judge 'was not alive to the judicial approach' in dealing with application under s 33 of the Act. He submitted that the learned judge had failed to address his mind to two critical facts that were part of the record before the court. The first fact, learned counsel said, is that the bankrupt was adjudged a bankrupt due to losses suffered on the share market. This fact was noted in the DGI's report dated 5 April 2013. The second fact is that the bankrupt had suffered those losses during the infamous Asian Financial Crisis on 1997/1998. Therefore it was submitted that the late bankrupt who was a businessman, became 'insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle'. There was no evidence, he said, to suggest that the late bankrupt had 'used dishonest or fraudulent methods in conducting his business affairs to the detriment of their creditors' or that the bankrupt had supported a lifestyle of 'rash and extravagant living'.

G [9] Relying on *Re Siow Ah Moi @ Seow Yin Fong; ex p United Orient Leasing Co Bhd* [2007] 3 MLJ 713 learned counsel for the appellant submitted that the Act is a social legislation and the purpose is not to keep a bankrupt as a bankrupt until the bankrupt settles all his obligations pursuant to the law; but to protect the bankrupt from harshness of the mounting debt and to enable fair and equal distribution of available assets among the creditors.

I [10] Learned counsel for the appellant further submitted that the learned judge had erred to hold that the bankrupt had committed an offence under s 16(2)(b) of the Act when the bankrupt failed to file his statement of affairs within 21 days as required under the section. This section reads:

Debtor's statement of affairs

16(1) ...

(2) The statement shall be so submitted within the following times:

(a) ...

(b) if the order is made on the petition of a creditor, within twenty-one days from the date of the order, but the Director General of Insolvency may in either case for special reasons extend the time by order made under his hand, to be forthwith filed, recording the reasons therefor.

[11] This 'offence' read together with s 33(4) of the Act persuaded the learned judge to require the bankrupt to meet the 50% dividend requirement in s 33(6) before he could be considered for any discharge from the bankruptcy. Learned counsel argued that the learned judge in reading s 16(3) of the Act had equated the expression 'contempt of court' in that section with the expression 'offence under this Act' in s 33(4). He submitted that the expression 'offence under this Act' when read in conjunction with Part VII of the Act should be read to refer to bankruptcy offences under s 117A of the Act. He further submitted that in *Re Joshua Tan Pin Pin; ex p William Jacks & Co (M) Sdn Bhd* [2007] 4 MLJ 534; [2007] 3 CLJ 153, s 33(4) of the Act is only activated when the bankrupt has been convicted of a bankruptcy offence. In this case the bankrupt was never tried or charge for any bankruptcy offence; and this was acknowledged by the DGI in his report.

[12] The bankrupt was made a bankrupt on a bankruptcy petition filed by the respondent. The respondent is not opposing or objecting the discharge of the bankrupt from the bankruptcy. From the Appendix A attached to the appellant's submission, there are all together 13 creditors. The grand total of debts admitted as provable in bankruptcy for these 13 creditors is RM146,621,991.01. However out of these 13 creditors, learned counsel submitted that eight creditors (No 1–8) in the appellant's Appendix A have agreed to consent to the discharge and not opposing the appeal. Between them the total debts admitted as provable in bankruptcy is RM97,229,665.78 which constitute 66.3% of the grand total of provable debt. The remaining five creditors (No 9–13 in Appendix A) who opposed the discharge and this appeal have a total provable debt of RM49,393,335.23 which is about 33.7% of the grand total of provable debt in bankruptcy.

[13] As to the judicial approach established and laid down through decided cases mentioned in the appellant's submission, it is this: in considering whether or not to grant the discharge, the court has to balance two conflicting concerns. The first concern is that it would be undesirable to let those who became bankrupt off the hook if they have brought about their bankruptcy by dishonest business dealings, rash and extravagance in living and if they have conducted their business affairs to the detriment of their creditors. The other concern is exactly the opposite: it would be in the interest of society and commercial morality that people who have become bankrupt through little

- A fault of their own but just being caught at the wrong turn of the economic cycle be given a second chance in life – see *Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation* [1998] 1 SLR 903; *Re Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd* [2004] 5 MLJ 227; [2004] 1 CLJ 624. And in *Re Zainuldin bin Ahmad Ex p Wong Siay Patt & Anor* [2007] MLJU 365 (as he then was) said that the discretion to be exercised by the court under s 33(3) of the Act is wide; and it is ‘fettered only with the consideration of equity, fairness and good conscience’ and that a bankrupt should not be put under bondage for his entirely.
- C [14] Ambank (M) Bhd, one of the creditors that appeared before us to oppose this appeal, submitted through its counsel that the discharged should not be allowed because the DGI report is incomplete. The report never disclosed or address the fact the bankrupt filed its statement of affairs (on
- D 9 June 2013) almost four months too late. The statement of affairs was supposed to be filed within 21 days from the date of receiving order. The RO was made on 18 February 2003. There was no evidence of approval by the DGI for filing of the statement of affairs beyond the 21 days as required under s 16(2)(b) of the Act. Learned counsel also submitted that the non-compliance
- E with the requirement of s 16(2)(b) was never addressed by the DGI in his report. Instead the report merely states that the bankrupt did not commit any offence under the Act. There was also no explanation from the bankrupt for the delay and non-compliance.
- F [15] Further it was submitted for Ambank (M) Bhd that the DGI report has failed to show that the DGI had undertaken a comprehensive and through investigation on the assets of the bankrupt. It was submitted that on the authority of *Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311; [2001] 3 CLJ 960 the DGI has the onerous task of ensuring that a
- G bankrupt does not attempt to hide or stashed away assets either in his name or the name of his wife and children with the intention to keep the assets out of reach of the creditors. In the instant case the DGI report only shows that the DGI had written only to the Municipal Council of Petaling Jaya to trace the assets of the bankrupt. It was submitted this effort was not enough. The
- H bankrupt is the eldest son if the late Tan Sri Lim Goh Tong, the founder of the Genting Highland Casino; and all the bankrupt’s sons are quite successful in their business which is evidence by a report in the ‘Edge’ dated 10 October 2012.
- I [16] We agree with learned counsel for the supporting creditor AmBank (M) Bhd that the DGI could have and in fact should have undertaken a more thorough investigation into the assets of the bankrupt; especially assets which the bankrupt owned in his name say within five years before the date of RO was pronounced. This would enable the DGI to make more realistic assessment of

the bankrupt's financial situation. The need for this to be done in this case is more pressing. In our view if the bankrupt can run himself into a debt of more than RM100m by speculating or playing the stock market surely he would need some solid security to secure the credit line that the creditors had extended to him. In this respect we agree with learned counsel when he submitted that the DGI report 'should have gone further by highlighting *ALL* properties which had been previously owned by the bankrupt and the current owners of the property now (if any). The report should also highlight whether the current owners are in a close relationship with the bankrupt and whether there are evidences showing that the current owners are holding the properties as nominees for the bankrupt?' The DGI had failed to address all these issues in the report.

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[17] Learned counsel for AmBank also submitted that the DGI report had failed to explain why the dividend offered to the creditors keep falling from time to time. He pointed to us that the first offer by the bankrupt in 2003 was in the total of RM11,346,590.08. But the second offer in 2014 was only RM10m and the current offer is only a total of RM839,633.73. The disparity, he submitted, was never explained in the report.

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[18] Learned counsel also complained that the DGI report merely states that the bankrupt was working and earning RM7,000 a month as project co-ordinator with a company called Vertica Resources Sdn Bhd. However the report did not say whether the bankrupt had other sources of income or gave any particulars about the company Vertical Resources Sdn Bhd like who owns it and who are the shareholders. Is it a family company?

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[19] Another creditor, Dato' Tan Seng Leong, also did not consent to the discharge and has opposed this appeal. Dato' Tan has submitted a provable debt of RM350m. In spite of several public examinations conducted by DGI the bankrupt failed to propose a reasonable offer to settle the amount owing. The bankrupt did offer during the public examination a sum of RM10m in total to settle the debt of all the creditors. Learned counsel for Dato' Tan argued that the offer indicated that the bankrupt has the means to settle the debt and that the bankrupt was not suffering from any serious hardship on the bankruptcy as he had the capacity to raise RM10m. It was submitted that the bankrupt lifestyle was not affected by the bankruptcy. In his written submission learned counsel submitted:

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The appellant's (the Bankrupt) lifestyle have not been affected by the AORO adjudicated against him because according to the public examination conducted in this proceedings the Appellant (the Bankrupt) has notified the Judgment Creditors that he travels to overseas frequently because of his work and each time he travels overseas, he will deposit a collateral amount with the Insolvency Department. The above clearly acknowledges that the Appellant (the Bankrupt) is living an ordinary

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A life and the said AORO does not prejudice his lifestyle and the Appellant had the means to make deposits when travelling overseas which acknowledges he has the financial capacity to propose a settlement for his debt.

B [20] Learned counsel submitted that all these were not adequately addressed in the DGI report. Other criticisms of the DGI report by Dato' Tan are listed as follows:

- C (a) The said Report failed to certify why the Bankrupt's friend was willing to propose an offer to settle the Bankrupt's debt for and on behalf of the Bankrupt.
- (b) The said Report also failed to certify the value of asset of the Bankrupt's wife and three children and how did his family obtained such a luxury life.
- (c) The total monthly expenses of the Bankrupt was not stated.
- D (d) It also does not state whether the Bankrupt had any other source of income besides his present income.
- (e) The Bankrupt's assets either in his name and/or in his nominee name failed to be reported in the said Report.
- E (f) The said Report does not state the true/actual financial standing of the Bankrupt.
- (g) The Insolvency Officer ('OA') has failed to submit a complete report under s 31(1) of the Bankruptcy Act 1967.
- F (h) OA has failed to state in the said Report whether the Bankrupt has any other assets not disclosed by him, assets that have been hidden or whether it is under the name of the Bankrupt's wife, children or nominee.

G [21] We have scrutinised the six page – DGI report at p 23 *RR Jld 2* B and C. We are equally appalled that in managing a debt of about RM150m the report was very brief. We observe that it was stated in the report that the court (ie the Bankruptcy Court) had postponed *sine die* one the public examination sessions to allow the DGI to further investigate on the assets of the bankrupt. DGI said he completed his investigation on 1 August 2012. However there is hardly any
H comments or remarks in the report as to the result of the investigation or as the efforts taken to conduct the investigation directed by the court. In the circumstance we are of the view that the criticisms level at the DGI report as being simplistic in approach and is incomplete and defective is justified.

I [22] Finally, we need to consider whether the learned High Court judge was correct to insist that the bankrupt came up with 50% dividend before he could get a discharge. Presently the DGI report states that the available assets only totaling RM839,633.73 which is sufficient to pay dividend of only 0.552%.

[23] The learned judge had ordered that the bankrupt came up with 55% dividend because the bankrupt had 'committed an offence' under the Act for failing to file his statement of affairs within 21 days after the RO was ordered as required under s 16(3).

A

[24] We notice that the requirement under that section is mandatory. Therefore a non compliance would mean a breach of statutory provision. Therefore we say the learned judge was correct to equate it with an offence. It must be noted that a contempt of court is also a punishable offence.

B

[25] For the above reasons we dismissed this appeal with costs of RM5,000 to each of the supporting creditors and to be paid by the appellant Lim Chee Wah personally, and we affirmed the High Court decision.

C

Appeal dismissed with costs of RM5,000.

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Reported by Afiq Mohamad

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